LIBRARY
SUPREME COURT, U.S.

No. 861

Office - Supreme Court, U.S.
FILED
APR 18 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

NORTH WESTERN–HANNA FUEL CO., ET AL,
Appellants;

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA,
Appellees,

and

CANADIAN NATIONAL RAILWAY COMPANY, ET AL,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

CURTIS H. BERG
Counsel of Record for
Railroad Appellees
175 East Fourth Street
St. Paul 1, Minnesota

CApital 2-2701 — Review Publishing Co., 141 E. 5th St., St. Paul 1, Minn. — CApital 2-2701

INDEX

	Page
Motion to Affirm	2
Statement	3
Argument	8
Conclusion	13

CASES CITED

	Page
Chicago, M. St. P. & P. R. Co. v. Illinois, 355 U.S. 300	9, 10, 11
Ex Parte 162	11
Ex Parte 166	11
Ex Parte 175, Increased Freight Rates, 1951, 280 I.C.C. 179, 281 I.C.C. 557, 284 I.C.C. 589, 289 I.C.C. 395, 297 I.C.C. 17	3, 4, 9, 10
Florida v. U.S., 292 U.S. 1	8, 10, 11
Illinois Commerce Commission v. U.S., 292 U.S. 474	8, 11
King v. U.S., 344 U.S. 254	8, 9, 10, 11
Minnesota Intrastate Freight Rates and Charges, 300 I.C.C. 201	3, 5, 11, 12
North Carolina v. U.S., 325 U.S. 507	8, 9
U.S. v. Louisiana, 290 U.S. 70	8, 10, 11
Wisconsin Railroad Commission v. C. B. & Q. RR., 257 U.S. 563	8, 12

STATUTES CITED

	Page
28 U.S.C.:	
Sec. 1253	3
Sec. 1336	3
Sec. 2101(b)	3
Sec. 2284	3
Sec. 2325	3
49 U.S.C.:	
Sec. 13	4
Sec. 13(4)	10

IN THE

Supreme Court of the United States

October Term, 1957

No. _____

North Western-Hanna Fuel Co.,
Berwind Fuel Company,
Carnegie Dock and Fuel Company,
Inland Coal & Dock Company, Division of
The North American Coal & Dock Company,

Appellants,

v.

United States of America,
Interstate Commerce Commission,

and

Railroad and Warehouse Commission of the
State of Minnesota,

Appellees,

and

Canadian National Railway Company,
Chicago and North Western Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago Great Western Railway Company,
Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
Chicago, Rock Island and Pacific Railroad Company,
Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Duluth & Northeastern Railroad Company,
Duluth, Missabe and Iron Range Railway Company,
Duluth, Winnipeg and Pacific Railway Company,
Great Northern Railway Company,
Illinois Central Railroad Company,
Minneapolis & St. Louis Railway Company,
Minneapolis, Anoka and Cuyuna Range Railroad Company,
Minneapolis, Northfield and Southern Railway,
Minneapolis, St. Paul and Sault Ste. Marie Railroad Company,
Minnesota, Dakota & Western Railway Company,
Minnesota Western Railway Company,
Northern Pacific Railway Company,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

Appellees,[1] pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that it is manifest the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

---

[1]This motion to affirm is made on behalf of the following common carriers by railroad serving the State of Minnesota, who are intervening defendants below, viz.:
Canadian National Railway Company,
Chicago and North Western Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago Great Western Railway Company,
Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
Chicago, Rock Island and Pacific Railroad Company,
Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Duluth & Northeastern Railroad Company,
Duluth, Missabe and Iron Range Railway Company,
Duluth, Winnipeg and Pacific Railway Company,
Great Northern Railway Company,
Illinois Central Railroad Company,
Minneapolis & St. Louis Railway Company,
Minneapolis, Anoka and Cuyuna Range Railroad Company,
Minneapolis, Northfield and Southern Railway,
Minneapolis, St. Paul and Sault Ste. Marie Railroad Company,
Minnesota, Dakota & Western Railway Company,
Minnesota Western Railway Company,
Northern Pacific Railway Company.

STATEMENT

This is a direct appeal under 28 U.S.C. Secs. 1253 and 2101 (b) from the final judgment and decree entered on December 26, 1957, by a district court of three judges specially constituted pursuant to 28 U.S.C. Secs. 2284 and 2325 which, *per curiam,* dismissed appellants' complaint. The complaint was filed in the United States District Court, Fourth Division, State of Minnesota, under the provisions of 28 U.S.C. 1336, seeking to suspend, annul, enjoin and set aside the report and findings of the Interstate Commerce Commission dated April 23, 1957, and the order of the Railroad and Warehouse Commission of the State of Minnesota dated May 20, 1957, issued in compliance therewith.

The opinion of the court below is not yet reported but is set forth in Appendix A of Appellant's Jurisdictional Statement. The order of the court below is set forth in Appendix B of Appellant's Jurisdictional Statement. The report and findings of the Interstate Commerce Commission in that Commission's Docket No. 31798, *Minnesota Intrastate Freight Rates and Charges* are reported in 300 I.C.C. 201.

In proceedings before the Interstate Commerce Commission, designated as *Ex Parte 175, Increased Freight Rates, 1951,* 280 I.C.C. 179, 281 I.C.C. 557, 284 I.C.C. 589, 289 I.C.C. 395 and 297 I.C.C. 17, that Commission found just and reasonable, and authorized, for application on interstate commerce throughout the United States and including interstate commerce moving from, to and within the State of Minnesota, increases in freight rates and charges amounting in the main to 15 percent, subject to certain maximums, limitations and hold-downs. An increase of 12 percent, subject to a maximum of 20 cents per net ton was authorized for application on

bituminous coal. The increases so authorized were found necessary in order to offset the railroads' increased costs and expenses incurred by reason of increases in wages, materials and supplies. In a series of hearings before the Railroad and Warehouse Commission of the State of Minnesota, increases corresponding to those authorized in Ex Parte 175 were sought for application on Minnesota intrastate traffic. The Minnesota Commission authorized certain increases on Minnesota intrastate traffic but excepted certain commodities from any increases. In addition to bituminous coal, the commodities so excepted included anthracite coal, coke, crushed rock, agricultural limestone, forest products (pulpwood, wood bolts, short logs and jack pine and aspen timber) and sugar beets.

By petition dated May 3, 1955, filed May 9, 1955, the rail carriers serving the state of Minnesota requested that the Interstate Commerce Commission institute an investigation of the rates and charges applicable on the commodities which had been excepted from the Minnesota Commission's authorizations, alleging, among other things, that the rates and charges applicable to the excepted commodities cast an undue burden upon, and resulted in unjust discrimination against, interstate commerce, and further resulted in undue and unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand and interstate and foreign commerce on the other. Thereafter, the Commission by order dated June 8, 1955, as corrected by a second order dated June 30, 1955, instituted the investigation prayed for under Section 13 of the Interstate Commerce Act (49 U.S.C. Sec. 13).

Hearing before the Interstate Commerce Commission was held on January 24, 25, 26 and 27, 1956, at St. Paul, Minne-

sota, before one of the Commission's hearing examiners, briefs filed, and a proposed report issued. Exceptions were filed, replies thereto made, and oral argument was held before the full Commission, which thereafter issued its report and findings dated April 23, 1957, wherein the Commission made the following findings and conclusions (300 I.C.C. at pages 223-224):

"We find and conclude that:

"1. The transportation conditions incident to the intrastate transportation of freight in Minnesota are not more favorable than those between Minnesota and interstate points.

"2. The amounts and percentages by which interstate freight rates and charges between points in Minnesota and points in other States were authorized to be increased in Ex Parte No. 175 are just and reasonable.

"3. The present Minnesota intrastate rates and charges on anthracite, bituminous coal, coke, crushed rock, agricultural limestone, forest products (pulpwood, wood bolts, short logs, and jack pine and aspen timber), and sugar beets are abnormally low and are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, thus accomplishing the purposes of the act, as set forth in the national transportation policy declared by the Congress, that the burden thus cast upon the interstate commerce is undue in and to the extent that these intrastate rates and charges are less than they would be if augmented by the increases authorized generally on the same commodities in Ex Parte No. 175, and that these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce.

"4. The undue, unreasonable, and unjust discrimination herein found to exist should be removed by applying to the Minnesota intrastate rates on the commodities in issue herein the same respective increases as are and for the future may be maintained by the respondents on like interstate traffic between points in Minnesota and adjoining States under our authorization in Ex Parte No. 175, provided, however, that increases may not be made which result in levels of rates and charges higher than the general levels of interstate rates and charges maintained on like traffic for movements to and from points in Minnesota.

"5. The establishment of increased intrastate rates and charges as provided in finding 4 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, will increase the respondent's revenue substantially, and will provide not more than a just proportion of the respondent's total railway operating income.

"6. The increased revenues to the respondents which will result from the increased rates and charges as provided in finding 4 are required from intrastate traffic in Minnesota in order to enable the respondents to furnish adequate and efficient railway transportation service.

"The foregoing findings and conclusions are without prejudice to the right of the authorities of the State of Minnesota, or of any interested party, to apply for modification thereof as to any individual rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

"An order carrying into effect the foregoing findings and conclusions will be entered, unless this Commission is notified by the Minnesota Commission within 30 days from the service of this report that the State Commission

will permit the increases required to remove the unlawfulness herein found to exist."

Thereafter, the Minnesota Commission, by order dated May 20, 1957, authorized application of the increases in issue, and such increases became effective on July 1, 1957, on all commodities in issue with the exception of bituminous coal, as appellants, commercial coal dock operators, instituted this action in the court below. An order was issued below on June 27, 1957, temporarily restraining the increases authorized on bituminous coal. The railroad appellees herein were permitted to intervene and become party defendants on July 12, 1957. The case was submitted to the court below on the record made before the Interstate Commerce Commission, briefs were filed and oral argument made. On December 26, 1957, the court below rendered its decision and judgment herein dismissing the complaint and vacating and setting aside the temporary injunction. Notice of appeal was filed January 20, 1958. By order of January 21, 1958, the court below denied plaintiffs' motion to continue the stay and temporary injunction, or in the alternative, an injunction pending appeal to this Court. An application to Mr. Justice Whittaker under date of January 25, 1958, was denied by order of January 31, 1958, providing:

"Appellants' application for a stay and for continuance or reinstatement of temporary injunction, r, alternatively, for an injunction, is denied, without prejudice to renew in the event this Court shall note probable jurisdiction of this appeal, or postpone further consideration thereof to a hearing on the merits."

The increase in the rates on bituminous coal moving in Minnesota intrastate commerce became effective January 26, 1958.

ARGUMENT

The per curiam decision of the statutory three judge court below is clearly correct and should be affirmed. The jurisdiction of the Interstate Commerce Commission and the authority for the exercise of federal power pursuant to Section 13 (4) of the Interstate Commerce Act is well established and confirmed in numerous decisions of this Court. *Wisconsin R. Comm. v. C. B. & Q. R. Co.*, 257 U.S. 563, *Illinois Commerce Commission v. U. S.*, 292 U.S. 474, *King v. U. S.*, 344 U.S. 254.

The findings in the case at bar conform to the standards and requirements for findings in proceedings under Section 13 (4) enunciated by this Court in *King v. U. S.*, 344 U.S. 254. (See also *North Carolina v. U. S.*, 325 U.S. 507.) In the case at bar the Commission found "that these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce." (Finding 3.) This ultimate finding, if supported by adequate subsidiary findings, sustains the authority of the Commission and the validity of the Commission's order. *King v. U. S.*, supra, p. 269; *North Carolina v. U. S.*, 325 U.S. 507, 514; *Florida v. U. S.*, 292 U.S. 1; *U. S. v. Louisiana*, 290 U.S. 70. Turning to the subsidiary findings made in the case at bar, it is again apparent that they wholly conform to those held sufficient in the King Case.

This Court's discussion of the necessary subsidiary findings appears in the *King Case* at pages 270 to 272, and 274 to 276. Comparing the subsidiary findings in the case at bar with those made in *King*, we find that Finding 1 herein compares with Finding 2 in *King*. Finding 3 in *King*, compares with Finding 2 and with a part of Finding 5 herein. Finding 3 herein, which in part provides that the present Minnesota

intrastate rates and charges * * * on bituminous coal * * * (is) abnormally low and * * * not contributing their fair share of the revenues required * * *" and that "the burden thus cast upon the interstate commerce is undue," compares with the essentials set forth in Finding 5 of *King*. Finding 5 herein corresponds to Finding 6 in *King* in part and to Finding 3 in part in *King*. Finding 6 herein is in addition to any finding made in *King*. Likewise in the case at bar, the Commission has included the savings clause referred to in *King* and in *North Carolina v. U. S., supra,* at 518, 535.

An analysis of appellants' objection to the Commission's findings in the case at bar clearly indicates that appellants sole objection thereto is that the Commission has failed to make its specific findings in dollars. This contention was completely rejected by this Court in the *King Case, supra,* page 274. In this connection, appellants refer to this Court's recent decision in *Chicago, M. St. P. & P. R. Co. v. Illinois,* decided January 13, 1958, 355 U.S. 300.

It is respectfully submitted that the latter case, referred to as the *Milwaukee Commuter Case,* is clearly distinguishable from the case at bar wherein the findings fully conform to those found sufficient by this court in *King v. U. S.*, 344 U.S. 254. The *Milwaukee Case* involved only commuter passenger fares, of only one railroad, and only a portion of the Milwaukee's total intrastate passenger operation in the State of Illinois. Moreover, that proceeding did not have as its genesis, a nation-wide general revenue increase case such as *Ex Parte 175* which is the proceeding underlying the case at bar. In short, in the *Milwaukee Case* the Commission had not, as in the case at bar, determined the justness and reasonableness of the increases on each and every commodity; nor had the Commission prior to passing upon the Milwaukee Com-

muter fares necessarily considered the revenues from interstate and intrastate traffic. In *Ex Parte 175,* in establishing the percentages and increases for application to various commodities, the Commission had taken into account the total revenue needs of the railroads from interstate and intrastate operations alike and it also, of necessity, had taken into consideration assuredly, the passenger deficit of the railroads as a whole, including the passenger deficit from both interstate and intrastate traffic. Moreover, the finding with respect to the revenue discrimination in the ***Milwaukee Commuter Case*** does not correspond to the finding made by the Commission in numerous proceedings instituted pursuant to Section 13 (4) of the Interstate Commerce Act and particularly did not conform to the finding which had been found as sufficient by this Court in *King v. U. S.*, 344 U.S. 254. The Commission, in Finding 5 in the case at bar, found that the establishment of increased intrastate freight rates and charges "* * * will provide not more than a just proportion of the respondents total railway operating income." In the *Milwaukee Commuter Case,* the lower three-judge court, 146 F. Supp. 195, at page 199, found that the finding of a "fair contribution to respondent's indirect cost and return on investment" was not the same as the finding in the *King Case* which corresponds to the finding in the case at bar.

Notwithstanding the foregoing, it is apparent from the decision of this Court that the ***Milwaukee Commuter Case*** was considered unique. In the *Milwaukee Commuter Case,* the Court stated that the precise situation presented therein had not theretofore been considered by the Court. The Court, moreover, referred to certain non-passenger fare cases in which Interstate Commerce Commission orders had been sustained, namely, *U. S. v. Louisiana*, 290 U. S. 70; *Florida v.*

U. S., 292 U.S. 1, and *King v. U. S.*, 344 U.S. 254. It is to be borne in mind that contrary to the *Milwaukee Case*, the decision in the instant proceeding involves state-wide application of rates on bituminous coal. This fact is equally true with respect to the remaining commodities which were in issue before the Commission in Docket 31798. In other words, a statewide basis of rates was in issue. It is true that only eight commodities were involved in the petition in the case at bar but the discrimination, as is clearly evinced from the Commission's report, was directed solely to the discrimination caused by the few commodities in issue. In *U. S.* v. *Louisiana*, supra, the statewide application of only some 37 commodities was issued. In *Florida v. U. S.*, supra, referred to as the *Florida Log Case*, only one commodity was involved and in *King v. U. S.*, although all commodities in the state were involved to the extent of the 5 percent differentiation following *Ex Parte 166*, the case likewise involved only a few commodities with respect to the differentiation, state v. interstate, resulting from the *Ex Parte 162* increases. Likewise in the *Milwaukee Commuter Case*, the Court refers to *Illinois Commerce Commission v. U. S.*, 292 U.S. 474, which involved only one charge, namely, a switching charge. It is apparent therefore that in the *Milwaukee Case* the Court was considering a new situation distinguishable from the case at bar which stems from a general revenue proceeding wherein the revenue contribution required from each commodity had been previously determined.

In the interest of brevity, the appellee railroads refer this Court of the lower court's discussion of the evidence as well as the evidentiary material contained in the report of the Interstate Commerce Commission in that Commission's Docket 31798. It is respectfully submitted that the findings

herein are completely supported by the evidence and the lower court's determination in this respect should be affirmed. Only one discussion of the evidence is warranted in this motion and that is directed to the appellants' contention of errors in the admissibility and scope of cross-examination of Exhibits 13 and 14. The court below fully reviewed this contention of the appellants and stated:

> "Our consideration of the record in support of the findings made by the Commission as to the need for increased revenue on bituminous coal * * * convinces us that substantial evidence supports its findings. Any alleged prejudice resulting from any error of the examiner in determining the sufficiency of the foundation for certain evidence received and the other procedural matters of which complaint is made do not require any discussion. The errors, if any, are not of sufficient gravity to justify the setting aside of the order of the Commission." (Jurisdictional Statement, p. 47)

The railroad appellees wish to point out that the exhibits to which complaint is directed supplemented direct oral testimony clearly establishing that the unit cost of intrastate traffic was at least equal to the unit cost of interstate traffic.

Appellants' contention that a separation of the railroads' intrastate and interstate revenues, costs, and expenses is essential, has been rejected previously by this Court. *Illinois Commerce Commission v. U. S.*, 292 U.S. 474, 483, 484; *Wisconsin Railroad Commission v. C. B. & Q. RR.*, 257 U.S. 563, 587. This contention is therefore without merit.

CONCLUSION

The railroad appellees respectfully submit that appellants present no substantial questions herein for the decision of this Court, and that the judgment decree and order of the District Court should be affirmed.

Dated at St. Paul, Minnesota, this 17th day of April, 1958.

Respectfully submitted,

CURTIS H. BERG
Counsel of Record for
Railroad Appellees
1120 Great Northern
Building
175 East Fourth Street
St. Paul 1, Minnesota